IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 15-6-2007

Coram

The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

C.M.A.No.183 of 2007 and M.P.No.1 of 2007

Chokkapan ...
Appellant/Respondent/Plaintiff

Vs.

1. Subramani
2. Nanjappan
3. Annadurai
4. Kumar ...
Respondents/Appellants/Defendants

This Civil Miscellaneous Appeal is preferred against the fair and decretal order dated 19.10.2006 made in A.S.No.5 of 2006 on the file of Principal Subordinate Court, Gobichettipalayam, reversing the judgment and decree dated 10.3.2005 made in O.S.No.100 of 1995 on the file of District Munsif, Gobichettipalayam.

For Appellant : Mr.A.V.Arun

For Respondents for R1 to R4: Mr.MA.P.Thangavel

J U D G M E N T

This Civil Miscellaneous Appeal is preferred against the fair and decretal order of remand dated 19.10.2006 made in A.S.No.5 of 2006 on the file of Principal Sub Judge, Gobichettipalayam, reversing the judgment and decree dated 10.3.2005 made in O.S.No.100 of 1995 on the file of the District Munsif, Gobichettipalayam.

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2. The appellant herein, who is plaintiff in O.S.No.100 of 1995, filed the suit for declaration of title to the suit property and to restrain the defendants by means of a permanent injunction from disturbing the peaceful possession and enjoyment of the suit property and by means of a mandatory injunction to remove the encroachment of 42.8 sq.ft. in the first item and 235.3 sq.ft. in the second item and to fence the building with the above extent and to deliver possession of the above portion

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after removing the encroachment.

3. According to the plaintiff, the suit property in both the items 1 and 2 were possessed by one Annamalai Mudali and Nallaiya Mudali, the predecessors of the plaintiff, who were in possession and enjoyment of the properties and thereafter plaintiff was in possession and enjoyment of the properties. The plaintiff renovated the house in item No.1 and is residing there. Plaintiff and his predecessors are using item No.2 as pavadi for doing their weaving invocation. Plaintiff obtained electric service connection and is paying taxes to the suit properties. The Government issued patta in respect of item No.1 and the suit properties were in possession of the predecessors for a long time and therefore plaintiff perfected title over the said properties. According to the plaintiff, the defendants have no right or title in the suit properties and the defendants' property is situated in the east of the suit property and due to the enmity the defendants disturbed the peaceful possession and enjoyment of the suit properties and attempting to encroach the same. During pendency of the suit, the defendants encroached a portion of 42.8 sq.ft. in item No.1 and 235.3 sq.ft in item No.2 and erected fencing and made construction without any right or title. Hence the encroachment is necessarily to be removed and the plaintiff is entitled to recover possession of the same. Earlier attempts made to trespass into the suit properties were prevented. On the basis of the said averments the plaintiff filed the suit to declare the title to the suit properties and to grant consequential permanent injunction and mandatory injunction to remove the encroachment and recover possession as stated supra.

4. The case of the defendants is that the plaintiff compelled the defendants to purchase the neighbouring property and the defendants having purchased the same and after purchase, started constructing house and only to prevent the construction of house the suit is filed on false averments. The allegation of encroachment is denied. The allegation that during the pendency of the suit encroachment was made and defendants erected fencing, was also denied. It is specifically stated in the written statement that the defendants erected construction only in their property and the plaintiff has no right or title or possession over the properties. The fencing is old and the Advocate Commissioner also noted the old foundation in the place. No objection was filed to the Advocate Commissioner's report by the plaintiff. Defendants and their predecessors are entitled to possession and enjoyment for over 50 years and they claimed that they have perfected title by adverse possession. Ultimately it is stated that the plaintiff has no right to seek removal of encroachment and recovery of possession and that the measurement and survey number is also not correct.

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5. On the said pleadings the trial Court framed issues as to whether the plaintiff is entitled to declaration of title and permanent injunction as sought for and whether the plaintiff is entitled to mandatory injunction and recovery of possession as prayed for.

6. On the side of the plaintiff, plaintiff was examined as PW-1 and plaintiff's brother Swaminathan was examined as PW-2 and his paternal uncle's son Thirumoorthy was examined as PW-3. 15 documents were marked on the side of the plaintiff. Ex.A-1 and A-2 are Sale deeds dated 16.1.1908; Exs.A-3 and A-4 are sale deeds dated 3.7.1916; Ex.A-5 is patta; ExA-6 is Survey notice; Ex.A-7, A-12 to A-15 are the receipts issued in the name of the plaintiff for electricity consumption; Ex.A-8 and A-11 are Kist receipts and Ex.A-9 and A-10 are house tax receipts issued in the name of the plaintiff. Second defendant was examined as DW-1 and the vendor of the defendant was examined as DW-2. Ex.B-1 certified copy of the petition and order in E.P.No.17 of 2000 in O.S.No.15 of 1995 on the file of District Munsif Court, Gobichettipalayam, was marked; Ex.B-2 is the sale deed executed in favour of the sons of Marappa Mudali; and Ex.B-3 is sale deed dated 21.11.1960 executed in favour of Nanjappa Mudali. Exs.C-1, C-3, C-7 are the Commissioner's report, C-2, C-4, C-8 are Commissioner's plan. Commissioner's additional reports are marked as Ex.C-6 and Ex.C-10. Exs.C-5 and C-9 are objections filed to the Commissioner's report.

7. The Trial Court on consideration of the documents, depositions as well as Commissioner's report, found that there is absolutely no acceptable evidence to establish perfection of title by adverse possession as claimed by the defendants over the disputed property. The claim of the defendants that they had not encroached and it was made only by their predecessors is also not established. Ultimately the suit was decreed as prayed for by granting declaration of title and consequential permanent injunction and mandatory injunction to remove the encroachment as found by the Commissioner in Ex.C-3 and C-4.

8. Aggrieved by the said decree and judgment the defendants filed A.S.No.5 of 2006 and the appellate court set aside the said judgment and decree of the Trial Court on the ground that the Advocate Commissioner has not measured properties of the plaintiff and defendants as per the order of this Court made in C.R.P.No.125 of 2002 dated 3.10.2002 wherein this Court taking note of the controversy in the suit and in order to put an end to the entire controversy, directed the Trial Court to appoint an Advocate Commissioner to measure the suit properties with the help of a qualified surveyor and file a report with

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plan. It was further ordered in the said revision petition that the Advocate Commissioner shall also be directed to indicate whether there is any overlapping of the property of the plaintiff and defendants, which would enable the Court to render proper findings. On the basis of the non-compliance of the said direction the appellate Court after setting aside the order of the Trial Court remanded the matter to the Trial Court to appoint an Advocate Commissioner as directed by this Court and get a report and to decide the matter afresh based on the Advocate Commissioner's report and plan. Aggrieved by the said remand order, this civil miscellaneous appeal is filed contending that the Advocate Commissioner in his report stated that the defendants encroached upon both the items of the suit properties and the defendants' property was not measured as they raised objections.

9. The learned counsel for the appellant in his argument admitted that the direction given by this Court in the above referred revision petition is not complied with by the Advocate Commissioner. However, he argued that due to the fact that the defendants objected measurement of their properties, the Advocate Commissioner could not measure their properties. The learned counsel also submitted that even if the Advocate Commissioner's report is found inadequate or non-compliance of earlier direction of this Court, the appellate Court itself could have appointed the Advocate Commissioner and based on his report the appeal could have been decided on merits without remanding the matter.

10. The learned counsel appearing for the respondents submitted that the respondents were ready and willing to measure their properties through the Advocate Commissioner as directed by this Court and non-compliance of the directions by the Advocate Commissioner in submitting his plan and report without measuring the properties of the defendants, ought not to have been relied upon by the Trial Court to decree the suit in favour of the plaintiff and therefore the appellate Court was justified in remanding the matter to the Trial Court for getting a report from the Advocate Commissioner after measuring the properties of the defendants also, as directed by this Court and to decide the suit afresh.

11. I have considered the rival submissions of the learned counsel for the appellant as well as respondents.

12. The point in issue is whether there was any encroachment by the defendants in the plaintiff's suit property in item Nos.1 and 2.

13. In an earlier occasion, between the same parties in C.R.P.No.125 of 2002 dated 3.10.2002, this Court gave specific direction to the Trial Court to appoint an Advocate Commissioner to measure the suit properties and also the properties of the defendants with the help of a qualified surveyor and file a report with plan. For issuing such a direction this Court gave reasons also. The said direction and order passed by this Court

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has become final. Admittedly the Advocate Commissioner appointed by the Trial Court after the order of this Court, has not measured the properties of the defendants. The report of the Advocate Commissioner states that on 27.6.2004 at 10.00 a.m. with the help of the Taluk Surveyor, he measured the suit properties. Nowhere in the said report it is stated that the defendants objected the measurement of their properties and therefore he was prevented from measuring the properties of the defendants. Hence the contention of the learned counsel for the appellant that due to the objections raised by the defendants in measuring the defendants' property the Advocate Commissioner could not measure the defendants' properties is unsustainable and is contrary to the report of the advocate Commissioner.

14. Taking note of the said factual aspect and having regard to the fact that the order of this Court is not complied with by the Advocate Commissioner as directed by this Court, the Appellate Court is justified in setting aside the judgment and decree passed by the trial Court based on the defective report by remanding the matter to the Trial Court to fully comply with the directions issued by this Court by getting report from the Advocate Commissioner as directed in revision petition and decide the issue afresh.

15. The power of remanding the matter to the Trial Court by the Appellate Court under Order 41 Rule 23 was considered by a Division Bench of this Court in the decision reported in 2005 (1) CTC 107 (V.Munusamy v. M.Suguna). In the said decision it is held that unless there are compelling circumstances in making the order of remand, the appellate Court shall not pass orders of remand. The compelling reasons to order remand is stated by the appellate Court in paragraph 10 of the Judgment by the appellate Court.

16. The contention of the appellant that the appellate Court itself without remanding the matter could have got fresh report from the Advocate Commissioner and decided the matter, is unsustainable because of the fact that in CRP No.125 of 2002, a direction was issued to the Trial Court to do the same. If such an argument is accepted, it will be virtually giving liberty to the Trial Court to ignore the directions given by the High Court and the same is impermissible. Thus there is a special circumstance in this case for ordering remand by the appellate Court as held by the Division Bench in the judgment above cited.

17. The learned counsel for the appellant also submitted that as per order 41 Rule 23 or Rule 23(a) or Rule 25, an unwarranted order of remand cannot be made and in support of his contention he cited a decision of the Honourable Supreme Court reported in (2002) 2 SCC 686 (P.Purushottam Reddy v. Pratap Steels Ltd). In the said judgment in paragraph 10 it is stated that an unwarranted order of remand gives the litigation an

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undeserved lease of life and therefore must be avoided. The said judgment nowhere prohibits the appellate Court from remanding the matters for valid and sufficient reasons. The Honourable Supreme Court only cautioned the appellate Court not to pass remand orders on flimsy grounds.

18. Here in this case, the order of this Court in revision has not been followed by the Trial Court while deciding the issue as to whether there was an encroachment by the defendants in the suit properties or not by measuring the properties of the defendants also. Had a report is obtained as ordered by this Court, the Court would have been armed with all the facts to decide the issue in a just and proper manner. Further, the trial Court is bound to comply with the order of this Court made in the revision petition.

19. The contention of the learned counsel for the appellant that the appellate Court itself could have decided the issue after getting report from the Advocate Commissioner, cannot be accepted in view of the fact that sufficient opportunity to all the parties concerned should be given and objections to the Commissioner's report, if any, has to be called for and after that only fresh decision has to be taken by the trial Court. If the appellate Court instead of remanding the matter, called for fresh report from the Commissioner and decided the matter, in effect, the same will be in violation of the earlier order of this Court. The lower appellate Court also gave sufficient reasons for remanding the matter, which does not call for any interference.

20. The learned counsel for the appellant submitted that the suit is of the year 1995 and by allowing the remand to stand it will amount to prolonging the litigation. The same can be remedied by fixing time limit to dispose of the suit.

21. Taking note of the submission and having regard to the fact that the suit is of the year 1995, the Trial Court is directed to dispose of O.S.No.100 of 1995 within six months from the date of receipt of copy of this order. There is no merit in the Civil Miscellaneous Petition and the same is dismissed with the above direction. No costs.

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Sd/
Asst.Registrar

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To

The Principal Sub Judge, Gobichettipalayam.

2. The District Munsif, Gobichettipalayam

3. The Section Officer, VR Section, H igh Court, Madras

+ one cc to Mr. P. Thangavel, Advocate sr no. 35124
+ one cc to Mr. A.V. Arun, Advocate sr no. 35465

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